

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4647 OF 2005

Bharat C. Lalwani & Ors.

... Petitioners

Vs.

Kumarpal Pannalal Baldota & Ors. ... Respondents

Mr. Niranjan Pandit i/b M/s. S.R. Rawell & Co. for the petitioners.

Mr. S.J. Kini for respondent 2.

CORAM: SMT. RANJANA DESAI, J.

DATED: 23RD AUGUST, 2005.

P.C.:-

1. The petitioners are the original defendants. Respondents 1 and 2 filed L.C. Suit No.6641 of 2000 in the City Civil Court at Bombay against the defendants for permanent injunction restraining the defendants from carrying out any alteration or installation of idol and holding any functions without permission of the trustees of Shree Mahavir Swetamber Murtipujak Tapagachha Jain Mandir Trust (for convenience, "the said Trust).

2. In the said suit, the plaintiffs took out Notice of Motion No.5817 of 2000 for ad-interim reliefs which were not granted. On 28/8/2003, the plaintiffs withdrew the notice of motion.

3. The case of the defendants is that the instant suit is not maintainable as all the trustees have not joined

in filing the suit and there is no resolution of the trust authorising the plaintiffs to file the suit. The plaintiffs took out Chamber Summons No.627 of 2004 on 16/4/2004 seeking amendment of the plaint. By the amendment, the plaintiffs wanted to add defendants 4, 5 and 6 as necessary and proper parties to the suit. According to the plaintiffs, when ad-interim relief was sought by the plaintiffs on 14/11/2000, the defendants have made a false statement that the defendants had obtained consent of two of the trustees to install the idol. According to the plaintiffs, this statement is false because the correspondence reveals that only one trustee had signed both the letters and further the defendants have admitted before the Charity Commissioner that the idol has been installed without the permission of the trustees. According to the plaintiffs, in view of the change in the circumstances, it is necessary to bring certain facts on record and seek consequential reliefs. In the circumstances, the present chamber summons was filed. It was granted by the trial court. That order is challenged in this writ petition.

4. I have heard Mr. Pandit, the learned counsel appearing for the petitioners/defendants and Mr. Kini, the learned counsel appearing for the respondents.

5. Relying on the judgment of this court in Nagar Wahan Mandir, Pandharpur v. Akbaralli Abdulhusen and Sons and Ors. 1994 Mh.L.J. 280, Me. Pandit contended that the

suit is not maintainable as all trustees are not joined as the plaintiffs. He submitted that in the reply to the chamber summons, objection regarding maintainability was taken and, therefore, it was obligatory on the trial court to frame the preliminary issue as regards jurisdiction and decide it before allowing the chamber summons for amendment. In this connection, the learned counsel relied on the judgment of this court in

Smithkline Beecham Consumer Healthcare Gmbh & Ors. v. Hindustan Lever Limited & Anr., 2003 Vol. 105 (2)

Bom.L.R. 547 where while considering section 9A of the Code of Civil Procedure, 1908 (for short, "the CPC"), this court has held that the word "jurisdiction" found in section 9A of the CPC must be given a wider interpretation and under section 9A, the court is required to consider the bar to the maintainability of the suit also. The learned counsel urged that the trial court erred in observing that the jurisdiction of this court is not challenged by the defendants but its maintainability in the absence of all the trustees is challenged and the question in the instant case is of some formal or technical defect in the suit and not the jurisdiction of the court. He submitted that the trial court has, therefore, proceeded on the wrong assumption.

6. The learned counsel then relied on the judgment of this court in **Arjun Dada Gadage v. Mallappa Gurappa Chougule and another, 2003 (4) Mh.L.J. 256** and contended that the court has to decide the issue of jurisdiction in

the first instance at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit. He submitted that the words "any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise", would include even a chamber summons for amendment of the pleadings and since in the affidavit in reply to the chamber summons, the defendants had taken the point regarding maintainability, the learned judge ought to have framed the issue as regards jurisdiction.

7. The learned counsel then relied on the judgment of this court in **Purushottam alias Nana U. Sanyasi v. A.N. Jog and others, 2005(1) Mh.L.J. 426** and contended that as the suit is not filed by all the trustees, it was not maintainable. A right had, therefore, accrued in favour of the defendants and by the present amendment, the plaintiffs want to defeat the right which had accrued in favour of the defendants. Such an amendment ought not to be allowed.

8. The learned counsel then relied on the judgment of the Supreme Court in **T.L. Muddukrishana and another v. Smt. Lalitha Ramchandra Rao, AIR 1997 SC 772** and contended that if a relief which is sought to be included in the pleadings by way of amendment is barred by

limitation, such an amendment cannot be allowed. He, therefore, submitted that the impugned judgment and order be set aside.

9. On the other hand, the learned counsel for the respondents relied on the judgments of the Supreme Court in **Ragu Thilak D. John v. S. Rayappan & Ors., (2001) 2 SCC 472 and in Sampath Kumar v. Ayyakannu and Anr., (2002) 7 SCC 559** and contended that the amendment is aimed at minimising the litigation and avoiding multiplicity of proceedings. It does not change the nature of the suit. He submitted that the court has to be liberal while considering the amendment applications. He contended that if the present case is examined in the light of the judgments of the Supreme Court on which he has placed reliance, it would be clear that no interference is necessary with the impugned order.

10. The amendment which is sought to be introduced is a pretrial amendment. It is true, as held by this court in **Arjun Dada's case (supra)**, section 9A of the CPC clearly mandates the court to decide the issue of jurisdiction in the first instance. It is also true that the court has to decide the issue of jurisdiction not only while considering the prayer for interim relief but also while considering any other prayers during the pendency of such a suit and, hence, amendment application would also be covered by section 9A. This is because if the court has no jurisdiction, it need not undertake the

exercise of dealing with the suit at all and this has to be decided at the threshold. Yet, the question is whether in the facts of the case, it can be said that the defendants did raise the issue regarding jurisdiction and called upon the trial court to frame the issue. It was contended that the objection is taken in the reply to the chamber summons. I have carefully gone through paragraph 5 of the said reply. Though indirectly it is suggested that the suit is not maintainable, the point is not taken clearly and the court is not called upon to frame the issue of jurisdiction. It may be that orally it was argued in the trial court that the issue may be framed but that, in my opinion, will not be sufficient.

11. Besides in this case, it is clear that the plaintiffs want to bring certain additional facts on record but thereby they are not trying to change the nature of the suit. In **Ragu Thilak's case'** **(supra)**, while considering Order 6 Rule 17, the Supreme Court has held that the dominant purpose of the amendment is to minimise the litigation. In that case, the suit was filed for permanent injunction restraining the defendants from demolishing the plaintiff's compound wall. During the pendency of the suit, the defendants allegedly entered the plaintiff's house unauthorizedly and demolished the compound wall on the north, east and west sides. The plaintiff filed an application for amendment of the plaint. The plaintiff wanted to incorporate relief of recovery of damages. The High Court had held

that the amendment sought would change the nature of the suit originally filed and the relief sought by way of amendment was barred by law of limitation. The Supreme Court held that amendment should still be allowed and the plea of limitation being disputed matter could be made the subject-matter of the issue.

12. In **Sampath Kumar's case (supra)**, the Supreme Court again reiterated the same principles while considering pretrial amendments. The Supreme Court held that though there was 11 years delay in filing the application for amendment, that by itself is not a ground for rejecting the application. The Supreme Court held that the question of delay should not only be decided by calculating the period from the date of institution of the suit but also by taking into account the stage to which the hearing in the suit has proceeded. There can be no doubt that the present application is a pretrial application. In my opinion, it is therefore, covered by the judgment of the Supreme Court in **Sampath Kumar's case (supra)**.

13. Viewed in the light of the above judgments, I am of the opinion that the trial court has rightly granted the chamber summons. It is always open to the petitioners to file written statement and defend the points taken by way of amending the plaint. All contentions of the parties would always be open and could be agitated at the trial. No case is made out for interference with the impugned

: 8 :

order. However, if an application is made for trying the issue regarding maintainability as a preliminary issue, the court shall deal with it independently and in accordance with law.

(SMT. RANJANA DESAI, J.)